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No. 03-761

IN THE

Supreme Court of the United States

RANCHO VIEJO, LLC,

Petitioner,

v.

GALE A. NORTON, Secretary of the Interior, *et al.*

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF GDF REALTY INVESTMENTS, LTD., PARKE PROPERTIES I, L.P., AND PARKE PROPERTIES II, L.P.

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I. INTEREST OF THE *AMICI CURIAE*

Amici Curiae GDF Realty Investments, Ltd., Parke Properties I, L.P., and Parke Properties II, L.P. (collectively referred to as "GDF" or "Amici")[1] respectfully submit this amici curiae brief in support of Petitioner Rancho Viejo,

[1] Consent to file this brief was requested and granted by counsel for Petitioner, Rancho Viejo, LLC, and by counsel for Gale A. Norton. Counsel for a party did not author this brief in whole or in part. The American Land Foundation, a 501(c)(3) non-profit foundation, made a monetary contribution to the preparation and submission of this brief.

LLC. As amply set forth in Rancho Viejo's Petition for Writ of Certiorari, the Circuit Court decision below conflicts with this Court's landmark Commerce Clause[2] decisions in *U.S. v. Lopez*, 514 U.S. 549 (1995), and *U.S. v. Morrison*, 529 U.S. 598 (2000), and thereby improperly upholds Congress' authority to regulate takes of the arroyo toad under § 9(a)(1)(b) of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et seq.* — a purely intrastate, non-commercial activity that has no discernable effect upon interstate commerce and is not part of a scheme of commercial regulation.

GDF's interest in this case stems from its litigation of very similar issues currently pending on rehearing in the Fifth Circuit Court of Appeals. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003). GDF's case involves a Commerce Clause challenge to the application of the ESA take provision to several species of wholly intrastate, non-commercial cave-dwelling insects. *Id.* at 625. The D.C. Circuit's reasoning in *Rancho Viejo* conflicts with the Fifth Circuit's reasoning in *GDF Realty* and, in so doing, improperly expands the government's Commerce Clause authority at the expense of private landowners, while intruding on the traditional land use authority of state and local governments.

II. SUMMARY OF ARGUMENT

The Fifth Circuit and the D.C. Circuit offer plainly conflicting rationales for analyzing the crucial question in Commerce Clause "substantial effects" cases — what activity or conduct "counts" for the purposes of determining whether a regulation substantially affects interstate commerce. The Fifth Circuit holds that the inquiry must be limited to activities regulated by the express terms of the

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[2] U.S. CONST. ART. I, § 8, cl. 3.

statute. *GDF Realty*, 326 F.3d at 633-36. In the case before this Court, the D.C. Circuit held to the contrary, expanding the substantial effects inquiry to activities and motivations outside the express terms of the challenged regulation. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1072-73 (D.C. Cir. 2003). Thus, although *GDF Realty* and *Rancho Viejo* involved essentially the same Commerce Clause challenges (application of the Endangered Species Act take provision to intrastate, non-commercial species), they reach different results on whether takes of those species substantially affect interstate commerce.

Because this element of Commerce Clause analysis is almost always case-dispositive, this Court should grant certiorari and resolve the split by affirming that only conduct regulated by the express terms of the challenged provision may be used for determining "substantial effect."

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN COMMERCE CLAUSE REASONING BETWEEN THE D.C. CIRCUIT IN *RANCHO VIEJO* AND THE FIFTH CIRCUIT IN *GDF REALTY*.

The D.C. Circuit's analysis of the limits of Congress' Commerce Clause authority in *Rancho Viejo* squarely conflicts with the Fifth Circuit's analysis of those same limits in *GDF Realty*. Because the Commerce Clause analysis in both cases involves application of the take provision of the Endangered Species Act to wholly intrastate, non-commercial species, and those respective courts apply this Court's landmark decisions in *U.S. v. Lopez* and *U.S. v. Morrison* in a vastly different manner, this Court should grant certiorari to resolve the split in reasoning and take the opportunity to bring order to the lower courts' Commerce Clause jurisprudence that has become confused, at best, and in seeming disregard of *Lopez* and *Morrison* at times.

A. FACTUAL AND PROCEDURAL BACKGROUND IN *GDF REALTY V. NORTON.*

Amici GDF et al. are the owners of approximately 216 acres of undeveloped land in Travis County, Texas, outside the City of Austin. *GDF Realty*, 326 F.3d at 624. Six species of cave-dwelling invertebrates — found only within a few caves and sinkholes on GDF's property and a few other nearby caves — are listed as "endangered" under the federal Endangered Species Act. *Id.* at 625. These six insect species (the "Cave Insects")[3] are small, eyeless creatures that live their entire lives underground in caves and sinkholes, have no commercial value and have never been bought, sold or traded in commerce in any form or fashion. *Id.*

Despite the entirely non-commercial, intrastate nature of the Cave Insects, the United States Fish and Wildlife Service ("FWS") has consistently asserted federal regulatory jurisdiction over GDF's property. *Id.* at 625-26. FWS asserts that GDF's proposed development plans will "take" the Cave Insects in violation of § 9(a)(1)(B) of the ESA. *Id.* In 1990, complying with FWS' requirements in effect at the time, GDF permanently dedicated over 10 acres of prime commercial real estate to a non-profit foundation as preserves for the Cave Insects. *Id.* at 625.

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[3] The six Cave Insects are: (1) Bee Creek Cave Harvestman; (2) Bone Cave Harvestman; (3) Tooth Cave Pseudoscorpion; (4) Tooth Cave Spider; (5) Tooth Cave Ground Beetle; and (6) Kretschmarr Cave Mold Beetle. The final rule listing five of the six the Cave Insect as "endangered" pursuant to § 4 of the ESA was adopted on September 16, 1988. 53 Fed. Reg. 36029. Previously considered to be the same as the Bee Creek Cave Harvestman, the sixth Cave Insect — the Bone Cave Harvestman — was listed as a separate "endangered" species on August 18, 1993. 58 Fed. Reg. 43818-01.

Since GDF's dedication of the Cave Insect preserves over a decade ago, FWS has repeatedly changed the rules for protecting the Cave Insects, made increasingly onerous demands for "dedication" of additional preserves, declared substantially all of the 216 acre property as "non-development area," blocked numerous development opportunities, and purposefully refused to act on GDF's §10(a) "incidental take" permit applications — a refusal to act that District Judge Sam Sparks characterized as "totally irresponsibl[e]" and "simply wrong." *GDF Realty Ltd. v. Norton*, 169 F. Supp.2d 648, 652 (W.D. Tex. 2001).

After years of futile attempts to comply with FWS' shifting, inconsistent and ever-increasing demands, GDF filed suit challenging the FWS' authority to regulate take of the Cave Insects on the GDF property. GDF filed suit against Defendants Bruce Babbitt, Secretary of the U.S. Department of the Interior and Jamie Rappaport Clark, Director, United States Fish and Wildlife Service ("collectively referred to as the "Government").[4] The parties submitted the case to the court on cross motions for summary judgment.

On August 30, 2001, District Judge Sam Sparks entered an Order and Judgment granting the Government's Motion for Summary Judgment and denying the GDF's Motion for Summary Judgment and rendered Judgment for the Government. *GDF Realty*, 169 F. Supp. 2d at 664. The District Court's Order held that the ESA take provision is a valid Congressional regulation under the "substantial effect on interstate commerce" category of Congressional authority. *Id.* at 657-663.

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[4] Gale Norton and Steven Williams, in their respective capacities as Secretary of the Interior and Director of the Fish and Wildlife Service, have been automatically substituted as parties in their official capacities. *See*, FED. R. CIV. P. 25(d)(1).

B. THE FIFTH CIRCUIT'S OPINION IN *GDF REALTY*.

GDF timely appealed to the Fifth Circuit Court of Appeals. On March 26, 2003, a panel of the Fifth Circuit Court of Appeals, consisting of Judges Davis, Barksdale and Dennis, rendered an opinion sustaining the constitutionality of the take provision, with Judge Barksdale writing the Panel's opinion. *GDF Realty*, 326 F.3d 622.

The Fifth Circuit panel opinion is noteworthy in several respects because of its rejection of the District Court's reasoning as well as that of the D.C. Circuit. First and foremost, in framing the inquiry for Category 3 "substantial effects" Commerce Clause cases, the Fifth Circuit expressly rejected the District Court's misdirected focus on the proposed use of GDF's property,[5] instead holding that the inquiry must focus on the express terms of the regulated activity — Cave Insect takes — rather than non-regulated conduct such as proposed commercial development. *Id.* at 634-36. The District Court reasoning rejected by the Fifth Circuit mirrors that of the D.C. Circuit in *Rancho Viejo*. Moreover, the Fifth Circuit explicitly stated its disagreement with the D.C. Circuit's reasoning in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). *GDF Realty*, 326 F.3d 622, 635-36. This clear split in reasoning between the Circuits is the primary focus of this brief.

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[5] Instead of addressing the effect of Cave Insect takes on interstate commerce, the District Court looked to GDF's proposed use of the property to locate a nexus with interstate commerce. For example, the District Court stated: "[I]t is obvious that the effect of building Wal-Marts and apartment complexes, in the aggregate, quite substantially affects interstate commerce." GBF Realty, 169 F. Supp.2d at 660 .

In addition to rejecting the property's use (or, similarly, the actor's conduct) as a basis for Commerce Clause jurisdiction, the Fifth Circuit also rejected various other arguments advanced by the Government and adopted, in varying degrees, by other courts. For example, the Fifth Circuit rejected the Government's evidence of scientific travel and publication as showing only a negligible and attenuated effect on interstate commerce. *Id.* at 637. The Fifth Circuit also rejected speculative future commercial benefits that might result from the Cave Insects as a means of showing substantial effect on interstate commerce. *Id.* at 637-38. The Court found that the mere possibility of such future benefits was too hypothetical and attenuated from the regulation in question to pass constitutional muster. *Id.*

After holding that Cave Insect takes alone do not substantially affect interstate commerce, the Fifth Circuit panel upheld Commerce Clause authority by aggregating the effect of *all takes* of *all endangered species*. *Id.* at 640. In other words, even though the Court rejected Cave Insect takes *alone* as a basis for federal jurisdiction, the Court then held that the aggregate effect of *all endangered species takes* could be used to justify regulating Cave Insect takes. *Id.* at 640. The Court reasoned that aggregation is appropriate because the "ESA's take provision is economic in nature" and, as a whole, the "ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave [Insects] is an essential part of it." *Id.*

In reaching this conclusion, the Fifth Circuit mischaracterized the take provision and the ESA as "economic" when, in fact, both the specific statutory provision and the statute in general are not regulations of a commercial activity or market — they regulate harm to listed species of wildlife. The Fifth Circuit panel's reliance on aggregation of all endangered species to sustain the take provision's application to the Cave Insects is the subject of a

Petition for Rehearing En Banc because it conflicts with this Court's opinions in *U.S. v. Lopez*, 514 U.S. 549 (1995) and *U.S. v. Morrison*, 529 U.S. 598 (2000). That En Banc Petition has been pending since May of 2003.[6]

C. THE CONTRADICTORY RATIONALES EMPLOYED BY THE FIFTH CIRCUIT IN *GDF REALTY* AND THE D.C. CIRCUIT IN *RANCHO VIEJO*.

The D.C. Circuit's opinion in *Rancho Viejo* squarely conflicts with the Fifth Circuit's opinion in *GDF Realty* on the issue that has vexed lower courts' analysis of Commerce Clause authority. The issue is this: what activity or conduct is the proper focus of the "substantial effects" Commerce Clause inquiry? Is the relevant activity or conduct that which is *expressly regulated* by terms of the statutory provision at issue? *See, e.g., GDF Realty*, 326 F.3d at 633-36. Or, can a court look to activity or conduct outside that which is expressly regulated by the challenged provision? *See, e.g., Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1072-73 (D.C. Cir. 2003).

The importance of the proper scope of this inquiry cannot be overstated — it is almost always case dispositive. If the

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[6] A Petition for Panel Rehearing based on a factual error is pending as well. The Panel premised its aggregation decision on an incorrect factual assumption regarding species interdependence. *GDF Realty*, 326 F.3d at 639-40. The Court stated that failure to regulate Cave Insect takes would allow the ESA regulatory scheme to be undercut because of the interdependence of species. *Id.* The Court's presumption of species interdependence is factually incorrect with regard to the Cave Insects. The Cave Insects exist in complete isolation. Cave Insect takes do not make it more (or less) likely that other endangered species takes will occur (or vice versa).

inquiry is broad — i.e., if a court can look beyond the activity or conduct regulated by the express terms of the provision at issue — it is plainly easier to establish a nexus with a "commercial" or "economic" activity, satisfying the first of the four considerations identified by this Court in *Morrison*, 529 U.S at 610-11. Establishing an activity's "commercial" or "economic" nature, in turn, allows for either a finding that the regulated activity substantially affects interstate commerce directly, or allows for a court to apply the aggregation principle first announced in *Wickard v. Filburn*, 317 U.S. 111 (1942). As *Wickard* demonstrates, once aggregation is allowed, regulation of even the most trivial of activities — such as consumption of home-grown wheat — can be sustained under Commerce Clause authority. *Id.* at 128-29.

Conversely, if the "substantial effects" inquiry is tied to the activity or conduct regulated by the express terms of a challenged provision, accurately describing such regulation as "commercial" or "economic" in nature may be impossible. If a challenged provision cannot be described as "commercial" or "economic" in nature, this Court's decisions suggest that aggregation is not available to demonstrate substantial effects on interstate commerce. *Morrison*, 529 U.S. at 613 ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.") It is on this fundamental issue that the Fifth and D.C. Circuits employed mutually exclusive rationales.

In *GDF Realty,* the Fifth Circuit held that an actor's conduct that is not the focus of the statute in question cannot be used to supply the nexus with interstate commerce. *GDF Realty*, 326 F.3d at 636. The District Court's decision below is the starting point for setting forth the Fifth Circuit's reasoning on this issue. *GDF Realty*, 169 F. Supp. 2d 648. The District Court upheld the ESA take provision by

focusing primarily on the proposed commercial development on the property which included the construction of a Wal-Mart on part of the property. *Id.* at 660-61.

The District Court's legal analysis in this regard is well illustrated with a few excerpts from the opinion: "Plaintiffs mistakenly focus only on the commercial aspects (or, in their view, the complete lack thereof) of the Cave Species. However, the regulated activity in this case is not simply the Cave Species. It is an alleged take of the Cave Species through plaintiffs' development of the Property. Plaintiffs cannot simply ignore the commercial nature of their activity." *Id.* at 658. In the same vein, the District Court stated, "it is obvious that the effect of building Wal-Marts and apartment complexes, in the aggregate, quite substantially affects interstate commerce." *Id.* at 660. In summary, the District Court found itself "hard-pressed to find a more direct link to interstate commerce than a Wal-Mart." *Id.* at 663.

On appeal, GDF argued that the District Court's analysis was flawed because the challenged regulation — the ESA take provision — does not regulate commercial development, such as the development of Wal-Marts and apartment complexes — it regulates takes of endangered species. The Fifth Circuit agreed, stating:

> Again, we must resolve the question of which activities are to be primarily considered in order to determine substantial effect *vel non*. Each of the three *Lopez* categories recognizes Congress' power to regulate where the *object of regulation* relates to interstate commerce: channels, instrumentalities, or activities. Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that, concerning

substantial effect *vel non,* Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce.

In expanding its scope-inquiry to plaintiffs' commercial motivations, the district court relied on *Groome,* which evaluated Congress' Commerce Clause power to regulate under the Fair Housing Act, 42 U.S.C. § 3604(f)(3)(B). *Groome* stated that, in *Lopez* and *Morrison,* 'neither the 'actors' nor the 'conduct' *of the regulation* had a commercial character." 234 F.3d at 204 (emphasis added). *Groome* recognized that, in analyzing the effect on interstate commerce, courts look only to the expressly regulated activity. In *Groome*, that was the sale and rental of housing. The actor's conduct was commercial in nature, but that characteristic was only relevant insofar as it fell within the regulated activity. *Id.* at 205-16.

Unlike *Groome,* the district court in this case looked primarily beyond the regulated conduct--Cave Species takes--in order to assess effect on interstate commerce. It looked to plaintiffs' planned commercial development of the property where the takes would occur. True, the *effect* of regulation of ESA takes may be to prohibit such development in some circumstances. But, Congress, through ESA, is not directly regulating commercial development.

> To accept the district court's analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce.
>
> *****
>
> In the light of the successful *facial* challenges in *Lopez* and *Morrison* and the emphasis our court and sister circuits have placed on the economic nature *vel non* of the expressly regulated activity, the district court erred in looking primarily to plaintiffs' commercial motivations.

GDF Realty, 326 F.3d at 634-36.

As this extended excerpt indicates, the Fifth Circuit squarely rejected the "Wal-Mart argument" relied upon by the District Court — i.e, the notion that an actor's commercial activity can supply the nexus with interstate commerce even when that commercial activity is not the object of the regulation. *Id.*

In contrast to the Fifth Circuit, the D.C. Circuit expressly adopted its own version of the "Wal-Mart argument." The D.C. Circuit held that, "the regulated activity is the construction of a 202 acre commercial housing development" by Rancho Viejo. *Rancho Viejo*, 323 F.3d at 1068.

By expanding the "substantial effects" inquiry beyond the express terms of the take provision, the D.C. Circuit easily

sustained the application of the take provision to the Arroyo Toad. "To survive Commerce Clause review, all the government must establish is that 'a rational basis exist[s] for concluding that a regulated activity sufficiently affect[s] interstate commerce.' [] And there can be no doubt that such a relationship exists for costly commercial developments like Rancho Viejo's." *Id.* at 1070 (citation omitted).

Rancho Viejo's holding reaffirms the D.C. Circuit's earlier opinion in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041. In *National Association of Home Builders*, the D.C. Circuit held that harm caused to habitat of an intrastate insect (the Delhi Sands Flower-loving Fly) by construction of a hospital and freeway and related use of building materials was a sufficient connection with interstate commerce. *National Association of Home Builders v. Babbitt*, 130 F.3d at 1056; *See also, Gibbs v. Babbitt*, 214 F.3d 483, 497 (4th Cir. 2000) (finding a connection with interstate commerce through the commercial motivations of farmers and others).

The reasoning split between the Fifth Circuit in *GDF Realty* and the D.C. Circuit in *Rancho Viejo* (as well as the D.C. Circuit's earlier opinion in *National Association of Home Builders*) is readily identified because they reach diametrically opposed positions on the same issue. *GDF* holds that commercial development activity causing take of endangered species does not count for the purposes of determining substantial effect; *Rancho Viejo* holds that it does. The split between the Circuits in this critical component of Commerce Clause analysis — determining what activity or conduct "counts" for the purposes of "substantial effect" — is clearly cast in the Courts' respective decisions, is substantial in scope because of its often case-dispositive nature and, therefore, cries out for resolution by this Court.

IV. CONCLUSION

For the foregoing reasons, Amici Curiae respectfully submit that this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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